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No. 90-633

In The

Supreme Court of the United States

October Term, 1990

EUGENE RAFFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

JURISDICTION

It is the Petitioner's position that the Respondent misconstrues not only the jurisdictional limitations of this Court, but also, the purpose behind a Petition for Writ of Certiorari. The Respondents state that the decision of the Florida Supreme Court is a non-final Order that does not meet the requirements of 28 U.S.C. §1257. What the Respondent fails to realize is that the decision of the Florida Supreme Court is, in fact, a final decision with regard to the Federal Constitutional issues raised in the Motion to Dismiss at the trial court level. If, in fact, the Petitioner is tried criminally for a violation of Section 370.08(3) of the Florida Statutes, the Constitutional issues (addressed by the Florida Supreme Court) are incapable of being raised again.

Rule 10 of the Rules of the Supreme Court of the United States, gives a great deal of guidance with regard to the reasons which will be considered in granting a Writ of Certiorari. In this case, Rule 10.1(b) and Rule 10.1(c) indicate the reasons that the present Writ should be granted:

> (b) When a state court of last resort has decided a Federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, or has decided a Federal question in a way that conflicts with applicable decisions of this Court.

Due to the fact that the Florida Supreme Court did, in fact, decide very important questions of Federal law in a manner conflicting with decisions of this Court and decisions of other State Courts of last resort, (cited in the Petition for Writ of Certiorari) and, due to the fact that the Florida Supreme Court's decision with regard to these Federal questions is not reviewable except by this Court, the jurisdiction of this Court to grant the Petition is firmly established.

PRE-EMPTION

The Respondent persists in deeming Section 370.08 (3) of the Florida Statutes, a "possession or landing law" related to red drum when it is neither. The Florida Statute is *simply* a law against the use of a purse seine to catch food fish. A landing law seeks to prohibit seagoing vessels from unloading enumerated species of fish, plants or animals on lands within the jurisdiction of the state seeking to prohibit such landings. The State statute in question is not a possession law or landing law relating to red drum; it is, rather, an attempt to restrict the federally approved *method* of taking food fish in the United States Exclusive Economic Zone. The Respondent points to the savings clause of the Federal Rule and allege that the Florida statute is a non-superseded "State landing law" related to the conservation and management of red drum. The Respondent seeks to avoid the fact that the State law simply attempts to prohibit the use of fishing equipment which the Federal Rule allows.

The Florida statute does not prohibit the landing and/or possession of any "red drum". If it did then the Preamble to the Rule would arguably allow the State law to be enforced. The Florida statute is, plainly and simply, a purse seine law which prohibits persons from taking or possessing *food fish* taken by purse seine. The Federal Rule allowed all United States commercial fishermen to use a purse seine to harvest red drum in the United States Exclusive Economic Zone. Arguing that red drum can be included within the very wide scope of the prohibitions as contained in the purse seine law, and that the law is, therefore, a "red drum possession law", is disingenuous. The Florida statute is certainly not a law prohibiting the landing or possession of red drum as contemplated by the exception to the Federal Regulation. *See* the Preamble to the Emergency Rules, at 51 Fed. Reg. 23,553 (June 30, 1986).

The State Attorney's Office commented (in dismissing the criminal action against several of the Petitioner's co-defendants) that the "Statute requires proof beyond a reasonable doubt, that the offender knew the food fish so possessed for sale or shipment were taken by purse seine or other prohibited means". The constitutional

issue to be addressed by this Court is centered around the possession of food fish *legally* taken by purse seine under Federal law with such possession being criminally prosecuted under the State purse seine law. The State officials went on to say that:

> We cannot meet this burden of proof as to the employees of Raffield Fisheries any more than we can meet this burden of proof against a food store, convenience store or fast food establishment. See *Appendix to Petition*, Page 19.

Apparently the State Attorney realized that all sardines are harvested by purse seine and, with such knowledge, every Florida sardine consumer violates the possession provision of Section 370.08(3) of the Florida Statutes.

In their brief, the Respondent sets out the various ways in which pre-emption of State law can occur. Petitioner's arguments concerning the manner in which pre-emption has, in fact, occurred are adequately set out in the Petition. It does seem interesting, however, that the Respondent completely ignores one of the major purposes of the Magnuson Act, which is to "achieve and maintain, on a continuing basis, the optimum yield from each fishery . . . ". 16 U.S.C. §1801(b)(3) and 16 U.S.C. §1801(b)(4) (1986). Can Florida citizens or persons aboard Florida registered vessels (which is it?) be prohibited from taking part in achieving the optimum yield in a Federal fishery or be prohibited from participating in reaching a Federal quota in a particular fishery? Such a result cannot be judicially sanctioned.

In the United States District Court for the Northern District of Florida, (Tallahassee Division), the State of Florida filed suit against Malcolm Baldrige, Secretary of Commerce, NOAA, the National Marine Fisheries Service and the Regional Director of the National Marine Fisheries Service. The Federal Defendants counter-claimed in May 1983 and on January 2, 1985, the parties filed a "Stipulated Settlement Agreement for Dismissal With Prejudice". The case, *State of Florida v. Baldrige*, No. 83-7071, Slip Op. (N.D. Fla. 1985) was dismissed with prejudice on January 7, 1985. In the Stipulated Settlement Agreement, the State of Florida was "allowed" to continue direct or indirect extraterritorial regulation of state registered vessels where there was no fishery management plan in effect. The United States and the State of Florida went

further in their Stipulation by agreeing on Federal pre-emption of state regulation of fishing equipment and/or methods. The State and United States agreed that State attempts to regulate the catching of food fish by purse seine, where such purse seine fishing was conducted *in compliance with Federal regulations* was, and would be, ***illegal!*** Specifically, the State of Florida and the United States agreed that:

> Where such mackerel fishing is conducted in the FCZ in compliance with Federal regulations, Fla. Stat. 370.08(3) *may not be enforced as to fishing in the FCZ or fish caught* in the FCZ. (emphasis supplied) *See*, paragraph 2, Stipulated Settlement Agreement for Dismissal with Prejudice.

In *State of Florida v. Baldrige*, No. 83-7071, Slip Op. (N.D. Fla. 1985) the United States counterclaimed for Declaratory Judgment alleging that the Federal regulations (which contemplated fishing equipment and methods [purse seine] used to catch food fish) under the Magnuson Act, invalidated Florida state fishery laws which directly or indirectly regulated fishing outside the state's waters. *See*, paragraph 1 in United States' Counterclaim. The United States took a *strong* position against the state's attempt to regulate federal fishing by vessels that were not registered in Florida. *See*, page 12, paragraph 12, of the United States' Counterclaim. The United States' position was summed up under paragraph 14 of the Counterclaim as follows:

> If it remains in effect, Florida Statute 370.08(3) will prevent the Department of Commerce and the National Oceanic and Atmospheric Administration from carrying out the Congressional mandates expressed in the Magnuson Act. Those mandates include managing a fishery unit throughout its range, achieving optimum yield from a fishery, basing management measures on the best available scientific information, promoting efficiency, and allocating fishing privileges in a fair and equitable manner. Interference by the Defendants with fishermen conducting activities sanctioned under the FMP hampers NOAA in performing its duties under the Act.

Copies of the Court's Order of Dismissal, the United States' Answer and Counterclaim, and the Stipulated Settlement Agreement are printed in their entirety in the Appendix hereto.

State of Florida v. Baldrige, closely mirrors another case which was filed in the United States District Court for the Southern District of Florida: *Southeastern Fisheries Association, Inc. v. Captain Livings*, No. 83-524-CIV-SMA, Slip Op. (S.D. Fla. 1983). In his Order granting a temporary restraining order against the State of Florida's proposed interference with purse seine fishing conducted in the Fishery Conservation Zone, Judge Aronovitz pointed out that the "state registered vessel" exception under the Magnuson Act and the "type of state regulation the Act allows" *could not include* the ban on the use of purse seines that the State Defendants were attempting to enforce. A significant part of Judge Aronovitz' Order had to do with the Petitioners Equal Protection and Commerce Clause arguments in the case at bar. Judge Aronovitz stated:

> Under Plaintiff's interpretation of Section 1856(a), boats from states other than Florida would be able to leave from Florida ports, enter the FCZ, use purse seines to make their catches, return to Florida ports, and unload their catches while Florida registered vessels would be prevented from doing any of the above. At oral argument, counsel for the State informed the Court that boats registered in other states would likewise be prohibited from the use of purse seines in violation of Section 370.08(3). However, the state's application of Section 370.08(3) to out-of-state vessels would constitute an unauthorized interference with commerce between the states in violation of the Commerce Clause. On the other hand, *it is neither fair nor equitable to allow boats registered in other states to reap the benefits the Act opens to them while Florida vessels are prohibited from the same conduct.* (emphasis added)

This Petition for Writ of Certiorari is the very last chance for Petitioner to assert his determinative Constitutional Rights violations.

In *Bateman v. Gardner* 716 F. Supp. 595 (S.D. Fla. 1989), the Court was faced with some of the same argument as contained in the Petition and Brief in Opposition now before this Honorable Court. The facts in *Bateman v. Gardner* were remarkably similar to the facts in the case at bar. Chief Judge James Lawrence King

found that Florida's continued enforcement of its shrimp management measures (in light of the existing Federal shrimp management plan) denied the Plaintiff, a Florida shrimp fisherman, equal protection under the United States Constitution. He then held that the Florida statutory scheme had been pre-empted by the Magnuson Act and the Federal Shrimp Plan. The decision in the *Bateman* case has been appealed to the Eleventh Circuit Court of Appeals with oral arguments having been heard on September 24, 1990. A decision is pending. A copy of the decision handed down in the *Bateman* case at the trial court level is reprinted in its entirety in the Appendix hereto.

The Respondent, as part of the pre-emption argument, seems to assume that the Petitioner's argument is that a vessel catching red drum with a purse seine cannot comply with the State possession restriction. The Respondent's argument based on this assumption misrepresents the Petitioner's position. Indeed, the Petitioner states that it *would be* possible to comply with the provisions of Section 370.08(3) of the Florida Statutes if a person in the Petitioner's position were to use vessels registered in states other than Florida, were to employ crew members other than Florida citizens, and land, process, and sell the fish in a State other than Florida. As was pointed out in the original Petition, this is an unconstitutional burden on interstate commerce and it adversely affects and discriminates against Florida's commercial fishermen and fish processors. See *Petition*, Pages 26 and 27.

The Respondent concludes the pre-emption argument by stating that the decision of the Florida Supreme Court does not conflict with the decision in *State v. Sterling*, 448 A.2d 785 (R.I. 1982). The response to this is simple: the savings clause did not allow an exception for State laws restricting the use of equipment (purse seine) allowed by Federal law. The Respondent skirts the fact that there is an inherent conflict between the Statute challenged and the Federal Regulation. The Federal Regulations *allowed* the taking of red drum by purse seine and the State statute disallows the taking of *any* food fish by purse seine. This is not merely a matter of semantics, it is an existing black and white conflict!

PRIVILEGES AND IMMUNITIES

The Respondent's Privilege and Immunities argument raises a very interesting question about the Respondent's basic position. The Respondent relies on the "State registered vessel exception", which is found in §306(a)(3) of the Magnuson Act [16 U.S.C. §1856], for the proposition that the State is empowered to, directly or indirectly, regulate the Petitioner's fishing activities in Federal waters. They further cite the holding in *Skiriotes v. Florida*, 313 U.S. 69 (1941) for the proposition that a State can regulate the extraterritorial conduct of its citizens when there is a *rational basis* for such enforcement and *no conflict* with Federal law. It is curious to see the Respondent then argue that *all* United States citizens (not just Florida citizens) are subject to the provisions of Section 370.08(3) of the Florida Statutes when in possession of food fish caught with a purse seine. If the Respondent agrees that the provisions of Section 370.08(3) of the Florida Statutes can only be enforced when dealing with a Florida registered vessel (or a Florida citizen), then how could they possibly apply the State purse seine prohibition to a Non-Florida resident legally taking red drum in Federal waters? Such reasoning is frightening in light of the constitutional principles upon which this Country is founded. The fact is that the State has no power to regulate the Federally approved manner in which United State's fishermen take fish while in Federal waters.

It is true that the case of *Toomer v. Witsell*, 334 U.S. 385 (1947), dealt with a situation where a State discriminated against non-residents. In the instant situation we have Florida citizens and commercial fishermen being discriminated against on the basis of their residence; it is, however, no less a violation of a Federal privilege and immunity which has been granted by the United States Constitution and Federal Fishery Management Laws and Regulations. The Respondent's indication that there is no "right to fish" on the part of United States citizens ignores the obvious; there has always been a right to fish, and the Magnuson Act recognizes this fact; it is only through the passage of laws that these rights have become regulated.

EQUAL PROTECTION

The Respondent argues that the Petitioner's equal protection arguments "ignore the holding in *Skiriotis (Sic) v. Florida*, 319 (Sic) U.S. 69 (1940) (Sic)". Once again, the Respondent fails to point out that the holding in *Skiriotes v. Florida*, 313 U.S. 69 (1941) – the correct spelling and citation – is limited to situations where there is "no conflict with Federal law". The Respondent relies on some of the language contained in *Skiriotes* and subsequent cases such as the *United States v. Alaska*, 422. U.S. 184 (1975) to attempt to provide justification for prosecuting the Petitioner. When this Court recognized "the special interest that a coastal state has in the preservation of the living resources in the high seas *adjacent to its territorial sea*" (emphasis added) *Id* at 198-99, this Court probably had no idea that the State of Florida, some fifteen (15) years later, would be attempting to have it determined that the waters off of the Louisiana coast are "adjacent to its territorial sea".

The Florida Supreme Court in its decision below stated that the extraterritorial enforcement of Section 370.08(3) of the Florida Statutes "serves a legitimate local purpose" and the statute "is directed at this *evil* [use of purse seine] in the only possible way: it eliminates Florida as a market for food fish obtained by using purse seines". (emphasis added) *See* App. 5, 6 to the Petition for Writ of Certiorari. Applying the reasoning of the Florida Supreme Court, a person catching red drum off of the coast of California and then transporting them by truck from California to Port St. Joe, Florida, would be subject to prosecution in the State of Florida for a violation of Section 370.08(3) of the Florida Statutes. Such a result has nothing to do with a "rational basis" for such regulation or a "legitimate local purpose" nor does it have anything to do with the "adjacent territorial sea", much less red drum conservation or management!

COMMERCE CLAUSE

In the Respondent's Commerce Clause argument, there is a continuation of reliance on the preposterous position that

enforcement of the purse seine law is an attempt to protect a "legitimate local public interest". The Respondent seeks to prohibit the Petitioner and all like him from using a purse seine (a Federally sanctioned means) to take a Federal fishery resource from the waters off of the coast of Louisiana. To what lengths is the State of Florida willing to go to protect its "legitimate local interest" in prohibiting the "evil" purse seine? Off of the coast of Alabama, Mississippi, Louisiana, or Texas? Off of the coast of California? What about Africa? The State Supreme Court's assessment of the power of the Florida purse seine law is disturbing at best. As has been stated previously, the enforcement of Section 370.08(3) of the Florida Statutes, does nothing to protect the red drum population in Federal waters. The one million pounds of red drum would have been taken with or without the Petitioner's participation! The only thing which the enforcement of the State statute accomplishes is a discrimination against Florida commercial fishermen in their legal harvest and processing of Federal fishery resources.

Finally, the Respondent states that "the only burden imposed by the law is a possibility that a Florida fisherman may have to land and sell his catch in another state". Once again, we are forced to ask how many interpretations of this particular law can the State of Florida make? Section 370.08(3) of the Florida Statutes, attempts to make it illegal for any Florida fishermen to take any food fish by purse seine in Federal waters *regardless* of the state in which that Florida fisherman chooses to land them. Are we now to understand that the State of Florida will not enforce the taking (as opposed to possession) portion of Section 370.08(3) of the Florida Statutes, if the Florida fisherman simply does not bring the fish back into the State of Florida? The State seems to indicate that there was no violation at the point that Mr. Raffield's Florida registered vessel, while in Federal waters south of Louisiana, caught "food fish" with his purse seine. If the purse seine law was not violated at that point, when did the legal Federal harvest of food fish, in this case, red drum become illegal? The Petitioner complied with all provisions

of the Federal Rule even to the point of having a Federal observer on board his Florida registered vessel.

CONCLUSION

Allowing the Respondent to call a state law prohibiting use of a federally approved fishing method a *landing law* and/or *possession law* for red drum violates due process, federal privileges and immunities, equal protection and common sense. It discriminates on the basis of citizenship or state of incorporation. No United States citizen should ever be prosecuted under such a strained and convoluted construction of an invalid state law. This Court cannot now turn its back on such a basic fundamental error.

It is high time for this Court to make a clear, comprehensive decision with regard to the Magnuson Act and the Federal fishing rights of United States Commercial fishermen. The basic Constitutional issues are now before this Court. The Federal fishery resources of the United States Exclusive Economic Zone should either be open to all United States' fishermen or closed to all! It *is* that simple!

Respectfully submitted,

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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION: FLORIDA DEPARTMENT OF NATURAL RESOURCES Plaintiffs, v. MALCOLM BALDRIGE, as Secretary of Commerce; THE UNITED STATES DEPARTMENT OF COMMERCE; DR. JOHN V. BYRNE, as Administrator of the National Oceanographic and Atmospheric Administration; WILLIAM G. GORDON, as Director of the National Marine Fisheries Services; and JACK BRAWNER, Regional Director of the National Marine Fisheries Service, Southeast Region; Defendants.	)	CIVIL ACTION NO. 83-7071

ORDER

(Filed Jan 7 1985)

Pursuant to the foregoing Stipulation, the Plaintiffs' Complaint and the Defendants' Counterclaim are hereby dismissed with prejudice, with each party to bear its own costs and attorney's fees.

January 7, 1985

/s/ William Stafford
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA; FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION: FLORIDA DEPARTMENT OF NATURAL RESOURCES Plaintiffs, v. MALCOLM BALDRIGE, as Secretary of Commerce; THE UNITED STATES DEPARTMENT OF COMMERCE; DR. JOHN V. BYRNE, as Administrator of the National Oceanographic and Atmospheric Administration; WILLIAM G. GORDON, as Director of the National Marine Fisheries Services; and JACK BRAWNER, Regional Director of the National Marine Fisheries Service, Southeast Region; Defendants.	)	CIVIL ACTION NO. 83-7071

STIPULATED SETTLEMENT AGREEMENT FOR DISMISSAL WITH PREJUDICE

(Filed Jan 2 1985)

The plaintiffs, State of Florida, et al., and the defendants, Malcolm Baldrige, Secretary of Commerce, et al., hereby stipulate under Fed. R. Civ. Pro. 41(a)(2) to a dismissal with prejudice and final settlement of all claims

and counterclaims in this matter, upon all parties' agreement to the following:

1. All parties agree that under Section 306(a) of the Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1856(a), where a vessel is registered under the laws of a state such as Florida, the registering state may directly or indirectly regulate that vessel's fishing in the Federal Fishery Conservation Zone (FCZ), absent a conflict with the lawful exercise of federal fisheries authority and/or jurisdiction under the Magnuson Act.

2. The parties agree that Fla. Stat. 370.08(3) (ban of purse seines to capture food fish) conflicts with federal regulations under the Magnuson Act to the extent that the state law attempts directly and/or indirectly to prohibit the use of purse seines to take king and Spanish mackerel in the FCZ. Where such mackerel fishing is conducted in the FCZ in compliance with federal regulations, Fla. Stat. 370.08(3) may not be enforced as to fishing in the FCZ or fish caught in the FCZ.

3. Each side will bear its own costs and attorneys' fees in this matter.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA; FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION: FLORIDA DEPARTMENT OF NATURAL RESOURCES Plaintiffs, v. MALCOLM BALDRIGE, as Secretary of Commerce; THE UNITED STATES DEPARTMENT OF COMMERCE; DR. JOHN V. BYRNE, as Administrator of the National Oceanic and Atmospheric Administration; WILLIAM G. GORDON, as Director of the National Marine Fisheries Services; and JACK BRAWNER, Regional Director of the National Marine Fisheries Service, Southeast Region; Defendants.	CIVIL ACTION NO. 83-7071

ANSWER AND COUNTERCLAIM

(Filed May 16 1985)

Defendants Malcolm Baldrige, the United States Department of Commerce, Dr. John V. Byrne, William Gordon, and Jack Brawner, through their undersigned counsel, answer the plaintiffs' complaint herein as follows:

COUNTERCLAIM

The United States of America, by its undersigned attorneys, and on behalf of the Department of Commerce and the National Oceanic and Atmospheric Administration, counterclaims against the plaintiffs as follows:

1. This counterclaim is for declaratory judgment under 28 U.S.C. 2201. It seeks a declaratory judgment that the federal regulations regarding management of the coastal migratory pelagic resources (mackerel fisheries) under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* (the Act), invalidate conflicting Florida state fishery law which directly and/or indirectly regulates fishing outside the state's waters.

2. This Court has jurisdiction over defendants' counterclaim under 28 U.S.C. 1345.

3. The Act provides for management of fisheries in the fishery conservation zone (FCZ). The FCZ begins at the seaward boundary of each coastal state and extends to a line 200 miles from the baseline of the United States. 16 U.S.C. 1811.

4. Among the purposes of the Act are promotion of domestic commercial fishing and achievement of optimum yield from each fishery, in accordance with seven national standards. 16 U.S.C. 1801(b)(3) and (4), 1851(a).

5. The mechanism for carrying out these purposes is a fishery management plan (FMP), developed by Regional Fishery Management Councils, and implemented with federal regulations promulgated by the Secretary of Commerce. 16 U.S.C. 1853-55.

6. The Gulf of Mexico and South Atlantic Fishery Management Councils jointly prepared an FMP for the Coastal Migratory Pelagic Resources.

7. The Secretary of Commerce approved the FMP and promulgated regulations implementing it on February 4, 1983 (48 Fed. Reg. 5270; 50 CFR Part 642).

8. The federal regulations, at 50 CFR 642.21, allow harvest by purse seines of 400,000 pounds of king mackerel and 300,000 pounds of Spanish mackerel in the FCZ of the Gulf of Mexico, and the same amounts in the South Atlantic FCZ. Section 642.24 requires purse-seine operators to send a letter of intent to the Regional Director of the National Marine Fisheries Service (NMFS), to notify the Center Director (NMFS) 48 hours before each trip, to report catch information within 15 hours after unloading, and to accommodate observers.

9. Florida Statute 370.08 provides:

> No person may take food fish within or without the waters of this state with a purse seine, purse gill net, or other net using rings or other devices on the lead line thereof, through which a purse line is drawn, or pound net, or have any food fish so taken in his possession for sale or shipment. The provisions of this section shall not apply to shrimp nets or to pound nets or purse seines when used for the taking of tuna or menhaden fish only. Any person violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

10. Section 642.21 of the federal regulations conflicts with Florida Statute 370.08(3) in that the federal regulations allow purse-seining in federal waters, while the Florida law purports

to prohibit purse-seining for mackerels, in federal as well as state waters, by citizens of any state.

11. Under the Supremacy Clause of the United States Constitution (Art. 6, Cl. 2), Florida Statute 370.08(3) is invalid to the extent that it conflicts with section 642.21.

12. Under Section 306(a) of the Magnuson Act, 16 U.S.C. 1856(a), Florida Statute 370.08(3) is also invalid to the extent that it purports to regulate fishing by vessels that are not registered in Florida.

13. Both the federal regulation and the State law are currently in effect, so that the public is subject to conflicting requirements.

14. If it remains in effect, Florida Statute 370.08(3) will prevent the Department of Commerce and the National Oceanic and Atmospheric Administration from carrying out the Congressional mandates expressed in the Magnuson Act. Those mandates include managing a fishery unit throughout its range, achieving optimum yield from a fishery, basing management measures on the best available scientific information, promoting efficiency, and allocating fishing privileges in a fair and equitable manner. Interference by the defendants with fishermen conducting activities sanctioned under the FMP hampers NOAA in performing its duties under the Act.

WHEREFORE, defendants respectfully request the Court to dismiss plaintiffs' complaint and to enter judgment for defendants upon their counterclaim.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FREEMAN R. BATEMAN,

Plaintiff,

v.

TOM GARDNER, individually, and as Executive Director of The Florida Dept. of Natural Resources, et al.,

Defendants.
_____/

CASE NO. 87-10062-CIV-KING

FINAL SUMMARY JUDGMENT

The court today faces several problems that have resulted from the apparently admirable efforts of Florida and the United States to protect an area of incredible natural beauty, the water surrounding the Dry Tortugas. To preserve the unique sea life in this area, both Florida and the federal government have enacted statutes and regulations that manage fishing in the region. The overall effect of this cooperative effort has been confusion, especially with respect to shrimping. The federal government bars shrimping in certain areas and allows it in others, while Florida prohibits its own shrimpers from shrimping in the entire area.

The plaintiff, a Florida resident and Florida licensed fisherman, brings this action under the Civil Rights Act and the United States Constitution, alleging that he is a victim of unfair discrimination. The recurring statement of the plaintiff's claim is a violation of the equal protection clause. The plaintiff notes that the Florida statute regulating shrimping prohibits Florida shrimpers from a

certain area, but does not prohibit shrimpers registered in other states. The plaintiff seeks a declaration that the metes and bounds description of the shrimping area protected by Florida violates the United States Constitution, and directly conflicts with the Magnuson Act, 16 U.S.C. § 1801, *et seq.* and the Gulf of Mexico Shrimp Fishery Management Plan, 50 C.F.R. 658, *et seq.* After considering the arguments of counsel on the cross-motions for summary judgment, the court finds the plaintiff's contentions are meritorious.

PROCEDURAL HISTORY

In August of 1987, the plaintiff commenced this action seeking declaratory and injunctive relief against the state officials in charge of enforcing *Fla. Stat. Ann.* § 370.1512, the Florida statute regulating shrimping in the Dry Tortugas. Shortly thereafter, both the plaintiff and the Florida officials cross moved for summary judgment.

After a hearing on the motions for summary judgment, on October 5, 1988, this court preliminarily determined that the plaintiff was being denied equal protection of law as a result of the combined operation of *Fla. Stat. Ann.* § 370.152 and 16 U.S.C. § 1856(a)(3), a key provision of the Magnuson Fisheries Act. The court ordered that the Attorney General of the United States be notified pursuant to 28 U.S.C. § 2403(a) because the plaintiff was making a constitutional challenge to an act of Congress.

On November 4, 1988, the United States sought intervention as a party plaintiff. The government sought to uphold the constitutionality of 16 U.S.C. § 1856(a)(3), and

they contended that no equal protection violation occurred. The government argued that any constitutional challenge to the Florida statute is obviated by the fact that a federal statute preempted the state statute.

All the parties agree that no genuine issue of material fact exists, and, thus, this case can be decided as a matter of law. The court has reviewed memoranda in support of the motions for summary judgment and after reviewing the relevant statutory framework, the court grants the plaintiff's motion for summary judgment.

STATUTORY FRAMEWORK

In 1976, Congress enacted the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* The Act grants the federal government exclusive fishery management authority within the "Exclusive Economic Zone" ("EEZ"). 16 U.S.C. §§1801(b)(1), 1811(a). Presidential proclamation 5030, dated March 10, 1983, established the EEZ. The EEZ is a zone or border which extends from the outer boundary of each state's territorial waters to a line two-hundred miles off-shore. *See Proclamation* no. 5030, 3 C.F.R. 22-23 (1983 compilation). The territorial waters of each state are not a part of the EEZ.

The Magnuson Act provides that the states cannot regulate, directly or indirectly, any fishing vessel outside their respective territorial borders "unless the vessel is registered under the law of that state." 16 U.S.C. § 1856(a)(3). Prior to the enactment of the Magnuson Act, a state could regulate its state registered vessels and state citizens while fishing in what is now the EEZ pursuant to

a line of Supreme Court cases culminating in *Skiriotes v. Florida*, 313 U.S. 69 (1941).

In 1957, prior to the passage of the Magnuson Act, the Florida Legislature enacted *Fla. Stat. Ann.* § 370.151 for the conservation of the supply of shrimp. The state sets out an area of shrimp beds off the coast of the Florida Keys, known as "Tortugas Shrimp Bed," where shrimp trolling is prohibited. Much of this area is beyond the territorial limits of Florida. In its filings before this court, Florida acknowledges that it has no authority under the Magnuson Act to enforce *Fla. Stat. Ann.* § 370.151 against non-Floridians outside the state's territorial waters.

In 1981, the United States Secretary of Commerce implemented the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, as promulgated in 50 C.F.R. part 658. In recognition of the importance of protecting shrimp nursery beds, the management plan has set aside an area in the Gulf EEZ near the Florida Keys in which fishing is generally closed to all shrimp fisherman. 50 C.F.R. § 658.22. This area, known as the "Tortugas Shrimp Sanctuary," is entirely outside the territorial limits of the state of Florida.

The shrimp beds protected by 50 C.F.R. § 658.22 and *Fla. Stat. Ann.* § 370.151 substantially overlap. Nonetheless, a portion of the state-created "Tortugas Shrimp Bed," lying outside the territorial waters of the state of Florida and within the EEZ, is not included with the boundaries of the federally-created "Tortugas Shrimp Sanctuary." In this area, which is in dispute here, federal law permits shrimping, but the application of the Florida statute prohibits Floridian fisherman from doing so.

DISCUSSION

For two reason, the court finds that the defendant's application of *Fla. Stat. Ann.* § 370.151 is unconstitutional in part. Specifically, both the equal protection and supremacy clauses require that a limited part of this Florida statute be struck down.

The court specifically notes that the impetus for the filing of this action was discriminatory impact. The Florida Legislature desired to prohibit shrimping in this region. The legislature first prohibited all shrimpers from the state's own waters. The legislature, however, did not stop its prohibition here. The legislature used discretion given to them by the Magnuson Act and prohibited its own shrimpers form the federal area. The net effect of the Florida legislature's action was discrimination against its own citizens, for only they were prohibited from portions of the federal area. The Florida legislature's action in prohibiting its own shrimpers from the federal waters violated the equal protection clause. Moreover, the Florida legislature offered no reason for discriminating against its own citizens in favor of out of state shrimpers. The legislature did not have to prohibit Florida shrimpers from this area. Its decision to do so, however, violated the equal protection clause.

The operation of the supremacy clause also corrects this discrimination. The United States argues that the federal Fishery Management Plan for the shrimp Fishery of the Gulf of Mexico, as promulgated by the Secretary of Commerce, 50 C.F.R. Part 658, preempts *Fla. Stat.* § 370.151(2) insofar as the Florida statute prohibits the plaintiff from shrimping in the disputed area. The United

States asserts that under preemption principles, the court can resolve the present controversy. Specifically, the federal government notes that preemption of the Florida statute as it applies to shrimping in the disputed area eliminates the unequal treatment of persons from different states, the problem which is of the greatest concern to this court.

Pursuant to the Supremacy Clause of the Constitution, Art. VI, cl. 2, the laws of the United States, including both federal statutes and federal regulations properly promulgated pursuant to statutory authorization, take precedence over state laws. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories*, 471 U.S. 707, 714 (1985). Preemption of state law by federal law can occur in several ways, including as a result of a conflict between federal state law. *Id.* at 713-14; *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145, 1150-1151 (1988). Such a conflict occurs when it is impossible to comply with both state and federal law, or when the state law stands as an obstacle to accomplishment of congressional purposes. *Schneidewind*, 108 S.Ct. at 1150-52.

In the present case, *Fla. Stat.* § 370.151(2) conflicts with the federal Gulf Shrimp Plan as promulgated by the Secretary of Commerce. Under the federal regulation, the plaintiff may take shrimp in the disputed area, while under the state statute, he may not. *See State v. Sterling*, 448 A.2d 785 (R.I. 1982) (state fishing law conflicts with federal Magnuson regulation where federal regulation permits larger flounder take than does state law). Moreover, one purpose behind the promulgation of federal Magnuson regulation was to promote domestic commercial fishing. 16 U.S.C. § 1801(b)(3). The Florida statute

stands as an obstacle to the accomplishment of this purpose by precluding Florida fisherman from participating in commercial shrimp fishing in the disputed area. Under preemption principles, this conflict must be resolved in favor of the enforcement of federal law. Accordingly, the court

ORDERS AND ADJUDGES as follows:

1. *Florida Stat. Ann.* § 370.151(2) violates the equal protection clause of the U.S. Constitution insofar as it restricts only Florida shrimpers from federal waters.

2. 50 C.F.R. Part 658 preempts § 370.151(2) insofar as *Fla. Stat. Ann.* § 370.151(2) prohibits shrimping where the federal regulations allow it.

3. The defendants are enjoined from enforcing *Fla. Stat. Ann.* § 370.151(2) in a manner that violates the equal protection clause or conflicts with the applicable federal regulations.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 11th day of July 1989.

/s/ JAMES LAWRENCE KING
JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF
FLORIDA

sar

cc: David Paul Horan, Esq.
Eric J. Taylor, Asst. AG
Richard Harrison, AUSA